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March 20, 2017

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143; *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247; *Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593

Dear Ms. Dortch:

CenturyLink, Inc. (“CenturyLink”) and Frontier Communications Corp. (“Frontier”) hereby ask the Commission to declare that price-cap incumbent local exchange carriers (“ILECs”) are non-dominant in the provision of business data services (“BDS”) at all capacity levels. As detailed below, this decision is the next logical step toward the congressionally mandated goal of replacing regulation with competition where possible, and it is compelled by the Commission’s long-standing, bipartisan jurisprudence concerning non-dominant treatment of entities that lack market power. As non-dominant carriers, price-cap ILECs would be freed from stultifying tariffing requirements and *ex ante* price regulation – obligations not faced by their competitors, even when those competitors have higher BDS market shares than ILECs do. That is an increasingly common scenario, as the record evidence demonstrates.¹ Competitive BDS-capable facilities already are ubiquitous. Among other data points, competitors operate in 95.2 percent of all census blocks where an ILEC offered special access-type service, competitive local exchange carriers (“CLECs”) are the only BDS suppliers in 13 percent of census blocks, and, among those buildings served only by an ILEC, 98.7 percent are close enough to competitive facilities to experience the price-constraining effects of competition. There are now multiple competitive alternatives to DSn services, including cable broadband and Ethernet provided over existing cable plant and hybrid fiber-coaxial (“HFC”) plant, which customers view as functional

¹ See *infra* Section II.B.

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substitutes for DSn services. Inter-platform competition will only grow when 5G services offer an additional ubiquitous last-mile alternative. Under established Commission precedent, this evidence of significant competitive options dispels any suggestion of market power.²

In addition to being warranted by the record evidence, a non-dominance finding would promote deployment in rural areas, facilitate negotiation by sophisticated BDS customers, further migration to next-generation IP services, and advance the Commission's commitment to technological and competitive neutrality by placing price-cap ILECs on an even footing with cable companies, competitive fiber providers, and other entities supplying BDS. For all these reasons, the Commission should establish a level playing field in what has become one of the most competitive sectors of the communications ecosystem, and unleash the innovation and investment that American businesses and consumers deserve.

I. THE TIME HAS COME TO DECLARE PRICE-CAP ILECS NON-DOMINANT IN THE PROVISION OF BDS.

Recent decades have witnessed fundamental shifts in the competitive dynamics of the telecommunications marketplace. In the Telecommunications Act of 1996 ("the 1996 Act"), Congress recognized that earlier conceptions of the entire marketplace as a natural monopoly had become outdated, and that policy-makers should promote competitive entry.³ Such entry, Congress and the Commission recognized, would in turn lead to deregulation as a provider's market power evaporates, allowing competitive forces rather than top-down mandates to assume the primary role in promoting customer welfare.⁴

Consistent with these expectations, as competition has grown, the Commission has steadily and deliberately ratcheted down its regulation of ILECs' BDS offerings. After adopting price cap regulation in the early 1990s,⁵ the Commission began to implement pricing flexibility

² See *infra* Section II.A; see also Letter to Marlene H. Dortch, Secretary, FCC, from James P. Young & Christopher T. Shenk, Sidley Austin LLP, Counsel to AT&T, WC Docket No. 16-143 *et al.* (filed Mar. 13, 2017).

³ See, e.g., Telecommunications Act of 1996, 110 Stat. 56, pmb1. (stating Congress's express goals of "promot[ing] competition and reduc[ing] regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies"); see also 47 U.S.C. § 1302.

⁴ See, e.g., *Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996; Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, Report and Order and Second Memorandum Opinion and Order, 14 FCC Rcd 11364, 11372 ¶ 12 (1999) (taking various steps to "promote competition by deregulating domestic entry").

⁵ See generally *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786 (1990).

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in 1999, putting in place a process by which price-cap ILECs could obtain a degree of discretion to adjust their prices.⁶ Of even greater relevance here, the Commission continued along this deregulatory path through a series of carrier-specific actions beginning in the mid-2000s, forbearing from the application of dominant carrier regulations to enterprise broadband services – generally defined to include packet-switched and optical transmission services – for most large price-cap ILECs.⁷ These actions applied to price-cap ILECs the same regulatory framework applicable to competitors’ enterprise broadband services, and most importantly, allowed ILECs to negotiate customer-specific rates, terms, and conditions free from competition-stifling tariff and price regulation. At the request of the providers seeking such forbearance, however, TDM-based, DS1, and DS3 special access services fell outside the scope of relief and thus remained rate-regulated.⁸ But in the intervening years, the provision of even these lower-capacity services has become overwhelmingly competitive, as detailed below.

⁶ *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999).

⁷ These decisions – which include orders and forbearance petitions deemed granted by operation of law – are referred to collectively as the “*Enterprise Broadband Forbearance Orders*” and include: *Verizon Telephone Companies’ Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law*, FCC News Release, WC Docket No. 04-440 (rel. Mar. 20, 2006); *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*; *Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007) (“*AT&T Forbearance Order*”); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*, *Petition of the Frontier and Citizens ILECs for Forbearance under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 19478 (2007); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd 12260 (2008); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 16304 (2007) (“*ACS Forbearance Order*”); *CenturyLink’s Petition for Forbearance from Dominant Carrier Regulation and the Computer Inquiry Tariffing Requirement with Respect to its Enterprise Broadband Services is Granted by Operation of Law*, FCC News Release, WC Docket No. 14-9 (rel. Mar. 16, 2015).

⁸ See, e.g., *AT&T Forbearance Order*, 22 FCC Rcd at 18706 ¶ 1 n.4; *id.* at 18717 ¶ 20 n.81; *ACS Forbearance Order*, 22 FCC Rcd at 16347 ¶ 96. The Commission stated at the time that “concerns regarding existing regulation of TDM special access inputs are better addressed in the pending rulemaking context,” where the Commission would “be able to develop a comprehensive approach based

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The time has now come for the Commission to pick up where it left off by extending the relief it afforded to most price-cap carriers for Ethernet offerings to their DSn BDS services as well, thereby continuing the Commission’s nearly two-decade-long deregulatory path.⁹ The original phase of that relief was a tremendous success, leading to an explosion of Ethernet offerings and continuous price reductions by ILECs and others.¹⁰ As a result, price-cap ILECs are far from being the leaders in the provision of BDS services in general or low-capacity BDS offerings in particular. Indeed, the enormous strides made by cable companies in this space have propelled them to the upper echelons of the BDS marketplace – for instance, Spectrum Enterprise (comprised of Charter, Time Warner Cable, and Bright House) has surged ahead of both CenturyLink and Verizon to become the third-largest Ethernet provider, and Comcast and Cox are not far behind.¹¹

Eliminating outmoded tariff and price cap regulation for “legacy” BDS services would yield important public interest benefits at a pivotal time in the continued development and deployment of next-generation networks and services, without imposing concomitant harms. *First*, non-dominant treatment of these services will promote investment. As CenturyLink, Frontier, and others have made clear, outdated price regulation in the BDS marketplace substantially undermines facilities investment, particularly in the rural areas that are often the most challenging to serve.¹² A large share of the territory served by CenturyLink, Frontier, and

on a full record that applies to all similarly situated incumbent LECs.” *AT&T Forbearance Order*, 22 FCC Rcd at 18717 ¶ 20 n.82; *id.* at 18722-23 ¶ 27.

⁹ The proposal set out herein springs directly from questions posed in the various notices the Commission has issued seeking comment on reform of the special access/BDS marketplace. *See, e.g., Business Data Services in an Internet Protocol Environment et al.*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723, 4725 ¶ 4 (2016) (“*BDS FNPRM*”) (“Today, the Commission initiates reform by proposing to end the traditional use of tariffs for BDS services and discarding the traditional classification of ‘dominant’ and ‘nondominant’ carriers.”); *see also id.* at 4844 ¶ 286 (“seek[ing] comment” and “encourag[ing] commenters to suggest other alternatives”); *id.* at 4906 ¶ 507 (seeking comment on “how to harmonize [the Commission’s] goal of technological neutrality with the application of price cap regulation”).

¹⁰ *See infra* Section II.B.

¹¹ *See* Vertical Systems Group, *Year-End 2016 U.S. Carrier Ethernet LEADERBOARD* (Feb. 23, 2017), <https://www.verticalsystems.com/vsglb/2016-u-s-carrier-ethernet-leaderboard/> (“VSG Year-End 2016 U.S. Carrier Ethernet LEADERBOARD”).

¹² *See, e.g.,* Joint Comments of CenturyLink, Inc., Consolidated Communications, FairPoint Communications, Inc., and Frontier Communications Corp., WC Docket Nos. 16-143 *et al.*, at 7-8 (filed June 28, 2016) (“Mid-Size ILEC Comments”); Joint Reply Comments of CenturyLink, Inc., Consolidated Communications, FairPoint Communications, Inc., and Frontier Communications Corp., WC Docket Nos. 16-143 *et al.*, at 5, 8-9 (filed Aug. 9, 2016) (“Mid-Size ILEC Reply Comments”); Letter from Mike Saperstein, Frontier Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.* (filed Oct. 21, 2016); *see also BDS FNPRM*, 31 FCC Rcd at 5007 (Dissenting Statement of

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other mid-sized incumbent providers consists of predominantly rural exchanges – exchanges that these carriers stepped up to serve when other carriers would not.¹³ These same carriers formed the “Invest in Broadband for America” coalition specifically to highlight and substantiate the connection between unwarranted regulation of BDS prices and declining network investment.¹⁴

The Commission has long recognized that regulation that constrains incentives to invest in and deploy the infrastructure needed to deliver broadband services is not in the public interest.¹⁵ By that same token, it has determined that non-dominant treatment “will encourage all potential investors in broadband network platforms, and not just a particular group of investors, to be able to make market-based, rather than regulatory-driven, investment and deployment decisions,” a conclusion that “is particularly true for new technologies and services that provide voice, video, Internet access, and other broadband applications.”¹⁶ By increasing flexibility and reducing dependence on legacy DSn services, a declaration of non-dominance will improve the business case for deployment and increase investment in next-generation facilities.

Second, non-dominant treatment will facilitate negotiation. The Commission found in the *Enterprise Broadband Forbearance Orders* that dominant carrier regulation impedes the ability of ILECs to compete effectively with non-dominant providers, respond efficiently and in a timely manner to market-based pricing promotions, and negotiate nationwide arrangements tailored to the needs of large enterprise customers with geographically dispersed locations (since tariff filings necessarily provide competitors with notice of an ILEC’s pricing strategies and competitive innovations).¹⁷ In some cases, tariffs serve as a *de facto* bar precluding a would-be customer from relying on ILEC offerings, because the ILEC lacks sufficient latitude to offer

Commissioner Michael O’Rielly) (“One of the best ways to ensure that providers invest to meet the growing demand for backhaul is to free them from legacy rules that hamstring competition.”).

¹³ Mid-Size ILEC Comments at 2 & n.3.

¹⁴ Invest in Broadband for America, <http://www.investinbroadband.org/> (last visited Mar. 19, 2017); *see also* Professor James E. Prieger, Investment in Business Broadband in Rural Areas: The Impacts of Price Regulation and the FCC’s Blind Spot, attached to Letter from Melissa Newman, Invest in Broadband for America, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.* (filed Aug. 8, 2016) (“[P]rice regulation of business broadband will have a major impact on available revenue in rural markets – as much as \$1.4B or more. The lost opportunities for revenue will lead to less broadband investment for the communities that need it most – slowing deployment and hurting economies that need help competing.”).

¹⁵ *See, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14878 ¶ 45 (2005) (“*Wireline Broadband Classification Order*”).

¹⁶ *AT&T Forbearance Order*, 22 FCC Rcd at 18732 ¶ 49.

¹⁷ *See, e.g., id.* at 18730-31 ¶ 46.

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discounts from tariffed rates. Thus, as with enterprise broadband offerings, the elimination of dominant carrier regulation with respect to DSn BDS offerings would permit price-cap ILECs to respond quickly and flexibly to a customer's needs by providing a fully customized solution, while allowing customers to take advantage of increasing BDS competition by shopping for the best offer.

Tariffs also are unnecessary to ensure that BDS customers get the service and terms that they want. BDS customers are, by their nature, sophisticated entities – businesses, governments, and other carriers. In the *Enterprise Broadband Forbearance Orders* and elsewhere, the Commission has repeatedly observed that these types of customers tend to be highly knowledgeable, often relying on consultants or in-house communications experts to make their purchasing choices.¹⁸ As ILECs have pointed out in this proceeding, many of these customers rely on RFPs or similar bidding processes, rendering tariffs *at best* an inconvenience.¹⁹ As such, these customers are equipped to negotiate against ILECs and to work out advantageous deals; they need not rely on tariffed rates.

Third, non-dominant treatment will advance the Commission's objectives of technological neutrality and regulatory parity. In this docket and elsewhere, the Commission has routinely highlighted the importance of these objectives. Indeed, the notion that "[t]echnological distinctions must not be allowed to obscure economic reality or distort future regulatory policy"

¹⁸ See, e.g., *ACS Forbearance Order*, 22 FCC Rcd at 16348 ¶ 99 ("We also observe the sophistication of the enterprise customers that tend to purchase these types of services. The Commission consistently has recognized that customers that use specialized services . . . demand the most flexible service offerings possible, and that service providers treat them differently from other types of customers, both in the way they market their products and in the prices they charge. These users tend to make their decisions about communications services by using either communications consultants or employing in-house communications experts. This shows that such customers are likely to make informed choices based on expert advice about service offerings and prices and thus suggests that these users also are likely to be aware of the choices available to them.") (citations omitted); *AT&T Inc. and BellSouth Corp., Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5709-10 ¶ 85 (2007) ("[E]nterprise customers tend to be sophisticated and knowledgeable (often with the assistance of consultants), . . . contracts are typically the result of RFPs and are individually-negotiated (and frequently subject to non-disclosure clauses), . . . contracts are generally for customized service packages, and . . . the contracts usually remain in effect for a number of years."); *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 ¶ 189 (2015) ("*Open Internet Order*").

¹⁹ See generally, e.g., Mid-Size ILEC Comments at 61-65; see also *Wireline Broadband Classification Order*, 20 FCC Rcd at 14901 ¶ 89 (stating that permissive detariffing would "best further th[e] goal" of promoting investment and innovation "by providing all wireline providers the flexibility to offer these services in the manner that makes the most sense as a business matter and best enables them to respond to the needs of consumers").

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was intended to rest at the heart of this rulemaking.²⁰ The Commission has regularly invoked these important principles to justify lifting asymmetric regulation. For instance, in granting forbearance relief for AT&T’s enterprise broadband services, the agency emphasized “the need to ensure regulatory parity” between AT&T and Verizon (which had already been granted non-dominant status with regard to those services); it explained that it wished “to avoid persistent regulatory disparities between similarly-situated competitors, and seek to minimize the time in which they are treated differently.”²¹ The courts have agreed that unlike treatment of similarly situated providers is not just bad policy – it is unlawful under the Administrative Procedure Act.²² As the Second Circuit famously admonished, an agency is not permitted to “grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday”²³

Given the overwhelming evidence that ILECs and others are similarly situated in the provision of BDS at all capacity levels – that all providers face competitive forces and must labor to keep customers satisfied in a demanding marketplace – the principles of regulatory and technological neutrality require that all providers be set on equivalent footing. The record demonstrates that BDS customers treat ILEC-provided and non-ILEC-provided BDS as substitutes (even if specific technologies are best suited for specific segments of the BDS market).²⁴ Under these circumstances – and given the competition described above – there may not be one rule for price-cap ILEC BDS services, and another for non-ILEC BDS offerings. A

²⁰ *BDS FNPRM*, 31 FCC Rcd 4726 ¶ 6.

²¹ *AT&T Forbearance Order*, 22 FCC Rcd at 18732 ¶ 50; *see also, e.g., Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, Memorandum Opinion and Order and Report and Order and Further Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, 28 FCC Rcd 7627, 7675-76 ¶ 107 (2013) (granting forbearance from access scripting rules to all ILECs not previously granted forbearance “[f]or the same reasons that we granted forbearance to AT&T, Verizon, and Qwest,” finding that “[i]mposing these costs on some competitors but not others may undermine competition”).

²² *See, e.g., Airmark Corp. v. FAA*, 758 F.2d 685, 692 (D.C. Cir. 1985) (invalidating agency action that “arbitrarily applied different decisional criteria to similarly situated carriers”); *Local 777, Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 869, 872 (D.C. Cir. 1978) (holding that an agency “cannot, despite its broad discretion, arbitrarily treat similar situations dissimilarly”); *Garrett v. FCC*, 513 F.2d 1056, 1060 (D.C. Cir. 1975) (same).

²³ *Marco Sales Co. v. FTC*, 453 F.2d 1, 7 (2d Cir. 1971), quoting *Mary Carter Paint Co. v. FTC*, 333 F.2d 654, 660 (5th Cir. 1964) (Brown, J., concurring).

²⁴ *See, e.g., USTelecom, Survey of Small and Medium Business Internet and Data Networking Service Users: Methodology, Results, and Implications*, June 2016 (Aug. 8, 2016) (“USTelecom Survey”), attached to Letter from Diane Griffin Holland, Vice President, Law & Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.* (filed Aug. 9, 2016).

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regime that continues to subject ILECs alone to prescriptive price regulation and tariffing requirements distorts the market and harms consumers.

Finally, the Commission can grant this relief without disturbing the continued application of Title II requirements to BDS offerings. As with the services that were covered by the Commission's enterprise forbearance grants, the DSn services addressed herein will remain subject to the Title II obligations that rates, terms, and conditions be just and reasonable and not unjustly or unreasonably discriminatory.²⁵ Elimination of dominant carrier regulation will not remove core protections such as those set out in Sections 201 and 202. Moreover, because the common carriage classification of BDS offerings is independent of the Commission's conclusions regarding broadband Internet access, Title II will continue to apply to them regardless of any potential changes to the Commission's open Internet rules.

II. THE RECORD DEMONSTRATES THAT PRICE-CAP ILECS ARE NON-DOMINANT IN THE PROVISION OF BDS.

The Commission's precedent and voluminous record evidence together demonstrate that ILECs are not dominant in the provision of BDS.

A. Longstanding and Bipartisan Commission Precedent Calls for Non-Dominant Treatment of Providers that Lack Market Power.

The relief requested herein is fully consistent with almost 40 years of Commission precedent regarding dominance. In 1980, responding to the developing competition in the communications industry and the economic costs imposed by unnecessary regulation, the Commission distinguished "dominant" carriers from "non-dominant" carriers.²⁶ It defined "dominant" carriers as those having "market power (*i.e.*, power to control price)," and defined "non-dominant" carriers as those lacking such power.²⁷ The Commission emphasized that regulation of carriers lacking market power was "unnecessary and counterproductive," because in such cases the "marketplace . . . can satisfy consumer demand efficiently without government intervention."²⁸ Accordingly, it determined that non-dominant carriers should (among other

²⁵ *Open Internet Order*, 30 FCC Rcd at 5800 ¶ 424 (noting that the services receiving forbearance in the *Enterprise Broadband Forbearance Orders* remain subject to sections 201, 202, and 208 of the Act).

²⁶ *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 F.C.C. 2d 1, 20 ¶ 54 (1980) ("*First Competitive Carrier Order*") (subsequent history omitted).

²⁷ *See id.*

²⁸ *Id.* at 20 ¶ 54.

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things) be relieved of direct rate regulation and subjected to reduced tariff obligations.²⁹ Notably, the Commission vowed to “be receptive to the presentation of evidence that circumstances have evolved in a manner which permits the easing of the regulatory requirements to which any carrier or class of carriers is subject.”³⁰ To this end, it identified certain indicia of market power relevant to this inquiry, including the number and size distribution of competing firms, the nature of barriers to entry, and the availability of reasonably substitutable services.³¹ Based on these criteria, the Commission found that the Bell System, with access to 80 percent of the nation’s telephones and its “overwhelming share” of the long distance market and a significant share of the private line service market, should be treated as dominant in all of its “basic transmission offerings.”³² Similarly, it found also to be dominant the roughly 1500 independent telephone companies, which “share in AT&T’s market power.”³³

In 1995, the Commission added an important chapter to its dominance jurisprudence by granting AT&T’s motion to be declared non-dominant in the provision of domestic interstate long distance service because it lacked market power.³⁴ There, it focused its inquiry on whether the company had an “ability to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable,” or, alternatively, an “ability to raise prices by restricting output.”³⁵ The agency’s non-dominance finding was based on several economic indicia, including the decline in AT&T’s market share from around 90 percent to 55-58 percent, the existence of numerous competitors who could serve a substantial number of new customers with little or no additional investment (including 3 nationwide facilities-based competitors), and the apparent willingness of customers to switch carriers in order to obtain price reductions or desired features.³⁶ Significantly, the Commission found that

²⁹ *Id.* at 30-49 ¶¶ 85-147. See also Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440, 16443 ¶ 5 n.9 (2007) (“Section 272 Sunset Order”).

³⁰ *First Competitive Carrier Order*, 85 F.C.C. 2d at 11 ¶ 26.

³¹ *Id.* at 21 ¶ 57.

³² *Id.* at 22-23 ¶¶ 62-64.

³³ *Id.* at 23-24 ¶ 65. Other categories of carriers, such as domestic satellite carriers, were also found to be dominant, while competitive “specialized common carriers,” such as MCI, and resale carriers, which faced significant competition from much larger carriers, were held non-dominant. *Id.* at 24-30 ¶¶ 66-84.

³⁴ *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3273 ¶ 1 (1995) (“AT&T Non-Dominance Order”).

³⁵ *Id.* at 3346 ¶ 138 (quoting *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Fourth Report and Order, 95 F.C.C. 2d 554, 558 ¶¶ 7-8 (1983) (internal quotations and citations omitted) (subsequent history omitted)).

³⁶ *AT&T Non-Dominance Order*, 11 FCC Rcd at 3303-08 ¶¶ 57-72.

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AT&T's "lower costs, sheer size, superior resources, financial strength, and technical capabilities" did not confer market power, explaining that those advantages "do not indicate that AT&T has the ability to control price."³⁷ In particular, it found that there was "no evidence that the advantages enjoyed by AT&T with regard to volume and term discounts give AT&T the power to sustain prices profitably above the competitive level."³⁸

Several years later, the Commission found that the Regional Bell Operating Companies ("RBOCs") were non-dominant in the provision of in-region, interstate, interLATA services through their Section 272 affiliates.³⁹ It found that such affiliates could not unilaterally raise the prices of such services by restricting their own output.⁴⁰ The Commission again noted that dominant carrier regulation can "dampen competition" and impose significant costs and burdens on carriers⁴¹ that can be justified "only if the benefits of such regulation outweigh the burdens that would be imposed on competition, service providers, and the Commission."⁴² It emphasized in particular that the elimination of tariffs would prevent "tacit coordination of prices" among competitors, and that the elimination of price floors would enable consumers to enjoy lower prices.⁴³

In 2007, the Commission concluded that the RBOCs were non-dominant in the provision of in-region, interstate, interLATA services irrespective of whether such services were provided through separate affiliates.⁴⁴ Although their market shares were "moderately high," "significant," or "relatively high" in various submarkets, and increasing,⁴⁵ the Commission found that the RBOCs faced substantial competition, including from wireless and VoIP providers, that these competitors had significant excess capacity and could serve a substantial number of new customers with little or no additional investment, and that customers were willing to switch providers in response to price changes.⁴⁶ As in prior instances, the Commission determined that,

³⁷ *Id.* at 3309 ¶ 73.

³⁸ *Id.*

³⁹ *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order and Third Report and Order, 12 FCC Rcd 15756, 15801-02 ¶ 81 (1997) ("*LEC Classification Order*") (subsequent history omitted).

⁴⁰ *Id.* at 15802-04 ¶¶ 83-85.

⁴¹ *Id.* at 15806-08 ¶¶ 88-90.

⁴² *Id.* at 15805-06 ¶ 87.

⁴³ *Id.* at 15807-08 ¶¶ 89-90.

⁴⁴ *Section 272 Sunset Order*, 22 FCC Rcd at 16441-42 ¶¶ 1-2.

⁴⁵ *Id.* at 16460 ¶¶ 39-40; *id.* at 16463 ¶ 44; *id.* at 16465 ¶ 49.

⁴⁶ *Id.* at 16460-69 ¶¶ 39-57.

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given the BOCs’ lack of market power in the provision of in-region, interstate, interLATA services, the burden of dominant carrier regulation would outweigh its benefits.⁴⁷

Just last year, the Commission confirmed the continued vitality of the dominance/non-dominance distinction, reiterating that “[t]he defining characteristic of a dominant carrier is the possession of market power, which in turn is defined as the power to control prices.”⁴⁸ Applying this test, the agency found that, given marketplace and regulatory developments, ILECs were no longer dominant in the provision of interstate switched access services.⁴⁹

B. The Record Conclusively Demonstrates that Price-Cap ILECs Lack Market Power in the Provision of BDS.

The evidence produced in this matter leaves no doubt: Price-cap ILECs no longer exercise market power in the provision of BDS. They therefore should be deemed non-dominant. The Commission’s data set reveals that there are numerous competing firms that either do supply, or are capable of supplying, BDS offerings to virtually any location served by a price-cap ILEC. The services these competitors offer are substitutes for the ILECs’ offerings, and they have shown time and again that the barriers to serving a particular location are readily surmountable, even at relatively low capacity levels. Under these circumstances, ILECs lack “market power (*i.e.*, power to control price),” and cannot be deemed “dominant.”

The record is awash in evidence that competitive BDS-capable facilities are ubiquitous. Drs. Israel, Rubinfeld, and Woroch found, based on the Commission’s collected data, that competitors operated facilities in 95.2 percent of *all* census blocks in which the ILEC offered special access-type service, 97 percent of all connections reported to the Bureau were in census blocks in which competitors had facilities, and 98.9 percent of all business establishments were in such census blocks.⁵⁰ The Commission’s data set also shows that there are census blocks in almost every MSA in which a CLEC provides service, but no ILEC does.⁵¹ In fact, the FNPRM observed that CLECs are the only suppliers of BDS in about 13 percent of census blocks – vastly

⁴⁷ *Id.* at 16474 ¶ 66.

⁴⁸ *Technology Transitions; USTelecom Petition for Declaratory Ruling That Incumbent Local Exchange Carriers Are Non-Dominant in the Provision of Switched Access Services; Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers*, 31 FCC Rcd 8283, 8286-87 ¶ 10 (2016) (“*US Telecom Non-Dominance Order*”).

⁴⁹ *See id.* at 8290-300, ¶¶ 19-48.

⁵⁰ *See* Mark Israel, Daniel Rubinfeld, and Glenn Woroch, Competitive Analysis of the FCC’s Special Access Data Collection, WC Docket Nos. 05-25 *et al.*, at Table C (filed Jan. 27, 2016) (“Initial IRW Analysis”).

⁵¹ *Id.* at 17.

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more than their ILEC counterparts.⁵² The Commission elsewhere has presumed ubiquitous competition based on evidence less conclusive than this.⁵³

Competitive facilities, moreover, were as of 2013 virtually always close enough to locations served by ILECs to be feasible and economic substitutes. The Commission has found “that fiber-based competitive supply within at least half a mile generally has a material effect on prices of BDS with bandwidths of 50 Mbps or less.”⁵⁴ Among those buildings that are serviced only by an ILEC, nearly all (98.7 percent) are within a half mile of at least one competitor, and the vast majority are within a half mile of at least *two* competitors.⁵⁵ The Commission’s own data from the 2013 collection demonstrates that CLECs regularly extend laterals from their fiber nodes at distances of well over 1,000 feet.⁵⁶ And, in any case, the deployment of fiber facilities is not necessary for a CLEC to provide competitive alternatives to BDS and particularly DSn services. Cable providers provide near-ubiquitous business broadband services over their existing cable plant and Ethernet over HFC plant to millions of business locations as well.⁵⁷ As the precedent discussed above makes clear, the presence of significant competitive options itself precludes any suggestion of market power, even if the provider’s actual market share remains “moderately high,” “significant,” or “relatively high.”⁵⁸ What matters is that competitors are present, and are able to serve customers with little or no additional investment (certainly no more investment than they have regularly been willing to make to serve such customers), and that customers are willing to switch providers in response to price changes.⁵⁹ All of these criteria are satisfied here.

Faced with evidence of virtually ubiquitous competitive facilities, proponents of broad regulation have been left to contend, implausibly, that cable-based services are not true

⁵² See, e.g., *BDS FNPRM*, 31 FCC Rcd at 4801 ¶ 182.

⁵³ See, e.g., *Amendment to the Rules Concerning Effective Competition*, Report and Order, 30 FCC Rcd 6574 ¶¶ 7-9 (2015) (presuming ubiquitous presence of DBS service for purposes of effective competition test while also acknowledging that some homes cannot utilize DBS offerings).

⁵⁴ *Id.* at 4791 ¶ 161.

⁵⁵ See Second Supplemental Declaration of Mark Israel, Daniel Rubinfeld, and Glenn Woroch, at 6, 14 (“IRW Second Supp. Decl.”), attached to Letter from Christopher T. Shenk, Sidley Austin LLP, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.* (filed Apr. 20, 2016).

⁵⁶ Mark Israel, Daniel Rubinfeld, and Glenn Woroch, Analysis of the Regressions and Other Data Relied Upon in the Business Data Services FNPRM and a Proposed Competitive Market Test: Third White Paper, WC Docket Nos. 16-143 *et al.*, at 33 (filed Aug. 9, 2016) (“Third IRW White Paper”).

⁵⁷ See generally Mid-Size ILEC Reply Comments at 28-41.

⁵⁸ *Section 272 Sunset Order*, 22 FCC Rcd at 16460 ¶¶ 39-40; *id.* at 16463 ¶ 44; *id.* at 16465 ¶ 49.

⁵⁹ *Id.* at 16460-69 ¶¶ 39-57. See also *AT&T Non-Dominance Order*, 11 FCC Rcd at 3303-08 ¶¶ 57-72.

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substitutes for ILEC BDS. The record comprehensively refutes these arguments. In fact, cable-provisioned services – including those relying on HFC plant or other technologies – are true substitutes for fiber-based ILEC BDS. HFC- and copper-based Ethernet and business broadband services (e.g., cable modem, DSL) provide speeds that frequently dwarf DSn capacities at a fraction of the price.⁶⁰ DOCSIS 3.1-enabled cable modem service offers downstream speeds of 10 Gbps – some 200 times the 45 Mbps offered over a DS3 connection.⁶¹ Cable providers have trumpeted their ability to provide service following their substantial, sunk investments in the marketplace.⁶² They are using their existing plant to provide real competition to ILEC BDS offerings, and are both willing and able to extend fiber to interested customers. Comcast, for example, boasts of its “broadly available” BDS offerings, explaining that its dedicated Internet access service is “easily scalable and can grow alongside a business without requiring the addition of new lines” and “typically costs less per Mbps than DS-1 or DS-3 services.”⁶³ Charter has told the Commission that, as a result of its fiber investments, “business services has been one of the fastest growing areas” within the company, with year-over-year revenue growth averaging just under 20 percent.⁶⁴ Cox states that it has “been a leader in providing Ethernet service.”⁶⁵ NCTA states that cable companies are “extend[ing] BDS facilities to new buildings on a daily basis, replacing rapidly vanishing TDM services with superior Ethernet technology and leading

⁶⁰ See, e.g., Mid-Size ILEC Reply Comments at 39-41 (discussing how HFC-based cable services are a direct source of competition for DS1 services).

⁶¹ See, e.g., CableLabs, *Featured Technology: Full Duplex DOCSIS® 3.1*, <http://www.cablelabs.com/full-duplex-docsis/> (last visited Mar. 7, 2017).

⁶² See, e.g., Press Release, Comcast, *Comcast Business Announces New Unit Targeting Fortune 1000 Enterprises* (Sept. 16, 2015), <http://corporate.comcast.com/news-information/news-feed/comcast-business-announces-new-unit-targeting-fortune-1000-enterprises> (reporting Comcast’s new business unit specifically marketing and selling enterprise services to Fortune 1000 companies nationwide); Thomson Reuters StreetEvents, *CMCSA – Q3 2015 Comcast Corp. Earnings Call*, Edited Transcript, at 9 (Oct. 27, 2015) (Neil Smit, President & CEO of Comcast Cable Communications, stating that Comcast is targeting “large enterprises that have 300 locations or more,” and that the company provides managed services “to more than 20 large enterprise companies and ha[s] already signed multiple eight figure deals.”); Charter, Spectrum Business, *Carrier Solutions*, <https://business.spectrum.com/content/carrier> (last visited June 16, 2016) (explaining that Charter had more than 10,000 fiber-lit buildings in early 2014; it currently has 12,000+ fiber lit buildings and 3,800 lit cell towers); Sean Buckley, *U.S. Fiber Penetration Reaches 39.3% of Buildings, Says VSG*, FierceTelecom (Apr. 4, 2014), <http://www.fiercetelecom.com/story/us-fiber-penetration-reaches-393-percent-buildings-says-vsg/2014-04-04> (reporting that Cox had, as of early 2014, Cox had “28,000 fiber lit buildings [and] 300,000 HFC serviceable buildings”).

⁶³ Comments of Comcast Corporation, WC Docket No. 16-143 *et al.*, at 11 (filed June 28, 2016).

⁶⁴ Charter Communications, Inc., Response to FCC’s Information and Data Request, MB Docket No. 15-149, at 18 (Oct. 16, 2015).

⁶⁵ Comments of Cox Communications, Inc., WC Docket No. 16-143 *et al.*, at 8 (filed June 28, 2016).

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the way in the IP transition.”⁶⁶ In short, cable-provided BDS is a reasonable substitute for ILEC service, as contemplated by the Commission’s dominance jurisprudence.⁶⁷

Even in areas where cable providers have not currently deployed last-mile fiber, they very often are prepared to do so when demand arises. The largest four providers had, as of 2013, upgraded their headends to provide Metro Ethernet service in more than [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] census blocks.⁶⁸ In this regard, cable companies are no different than mid-size carriers like CenturyLink and Frontier, which do not come close to having ubiquitous last-mile fiber but rather generally deploy it in only response to specific customer demand.⁶⁹

Customers, too, view cable-based BDS as true substitutes for ILEC offerings. The record makes clear that alleged distinctions in the quality of service offered by ILECs and cable providers are illusory, as cable providers are increasingly offering service-level agreements (“SLAs”) ensuring comparable performance.⁷⁰ As CenturyLink and Frontier have noted, a 2016 USTelecom survey reveals that BDS customers frequently consider these business broadband

⁶⁶ Comments of the National Cable & Telecommunications Association, WC Docket No. 16-143 *et al.* (filed June 28, 2016) (“NCTA Comments”). NCTA also calls the Ethernet market “enormously competitive” (a fact it attributes to cable companies), *id.* at 4-5, and explains the ways in which “Ethernet services” such as those that its members provide “are superior” to legacy services, *id.* at 5.

⁶⁷ See *First Competitive Carrier Order*, 85 F.C.C. 2d at 21 ¶ 57.

⁶⁸ See CenturyLink, Inc. *et al.*, Motion to Strike, WC Docket Nos. 16-143 *et al.* (filed June 17, 2016) (“Motion to Strike”), Attach. A, Declaration of Glenn Woroch & Robert Calzaretta ¶ 13.

⁶⁹ In the 2013 *Data Collection Implementation Order*, the Wireline Competition Bureau explained that it was “particularly interested in *Connections* that have been upgraded to business class Metro Ethernet (or its equivalent)” – regardless of whether they were currently being used to provide fiber-based service – because it “is reasonable to assume that such upgrades were made based on strong expectations as to the likelihood of sufficient demand for *Dedicated Service* and are sources of potential competition.” *Special Access for Price Cap Local Exchange Carriers*, Report and Order, 28 FCC Rcd 13189, 13200-01 ¶ 26 (WCB 2013) (“*Data Collection Implementation Order*”) (citation omitted). See also *BDS FNPRM*, 31 FCC Rcd at 4739 ¶ 34, 4834 ¶ 250 (noting that the Bureau had defined connections as capable of providing a dedicated service for data reporting purposes when they are connected to a Metro Ethernet-capable headend).

⁷⁰ See, e.g., Letter from Melissa E. Newman, Vice President – Federal Policy and Regulatory Affairs, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 15-247 *et al.* (filed Apr. 8, 2016) at 10-11 (demonstrating that cable providers’ SLA guarantees are comparable to ILECs’), 12-13 (explaining that cable offerings are viable and attractive to many customers). See also Letter from Maggie McCready, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 15-247, at 3 (filed Mar. 1, 2016) (explaining that business customers have been purchasing lower-cost cable offerings and supplementing them with easily obtained equipment to create high-quality virtual private networks) (“Verizon March 1 Ex Parte”).

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services, as well as ILECs' DSn and Ethernet services, when shopping for data services, and are not only willing to switch among these platforms but often do so.⁷¹ To this end, CenturyLink has put voluminous evidence on the record showing that it purchases HFC-based Ethernet access services from cable providers and treats those as interchangeable with fiber-based Ethernet access services for a substantial portion of the Ethernet-based services it provides outside its ILEC footprint.⁷²

Moreover, cable-based competition is accelerating quickly: According to CenturyLink's Carla Stewart, in January 2014 the company had access to [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] commercial buildings or addresses through non-ILEC providers.⁷³ As of November 2015, that number had grown to over [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] commercial buildings or addresses through non-ILEC providers, an increase of more than [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] percent since January 2014.⁷⁴ Verizon has noted that it has entered into purchasing relationships with cable companies and obtains Ethernet services from them when "they are the best access option available,"⁷⁵ and AT&T has submitted evidence that it uses a number of alternative out-of-region suppliers for wireless backhaul and business services.⁷⁶

There is no merit, moreover, to claims that ILECs enjoy market power with respect to lower-capacity BDS offerings. Dr. Rysman found that circuit-based (as opposed to packet-based) services accounted for 42 percent of competitive providers' BDS revenues,⁷⁷ and that competitive providers earned about 38 percent of circuit-based BDS revenues.⁷⁸ Fully 88 percent of CenturyLink's sub-50 Mbps bandwidth, and 90 percent of AT&T's, is within a half mile of competitive fiber.⁷⁹ Some 55 percent of CenturyLink's aggregate bandwidth for sub-50

⁷¹ Mid-Size ILEC Reply Comments at 9-10, 37-38 (citing USTelecom Survey at 5-7, 9).

⁷² See, e.g., Reply Declaration of Carla Stewart ¶¶ 2, 3, 9, attached as Exhibit 3 to Reply Comments of CenturyLink, Inc., WC Docket Nos. 05-25 *et al.* (filed Feb. 19, 2016).

⁷³ *Id.* ¶ 3.

⁷⁴ *Id.*

⁷⁵ Verizon March 1 Ex Parte, Attach. A, Declaration of Brendan Gunn and Daniel Higgins ¶ 17.

⁷⁶ Comments of AT&T, Inc., WC Docket Nos. 16-143 *et al.*, at 16 (filed June 28, 2016).

⁷⁷ Marc Rysman, *Empirics of Business Data Services*, White Paper, Apr. 2016, at 7 (rev. June 2016) ("Revised Rysman Report").

⁷⁸ *Id.*

⁷⁹ See Mark Israel, Daniel Rubinfeld, and Glenn Woroch, Analysis of the Regressions and Other Data Relied Upon in the Business Data Services FNPRM And a Proposed Competitive Market Test: Second

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Mbps services, and 59 percent of AT&T's, is in buildings that have *two or more* fiber-based competitors in the building or within 1,000 feet.⁸⁰ The Commission's data set shows that competitive facilities at this distance exert significant competitive force, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL].⁸¹ Frontier announced that it lost 14,000 business customers in the fourth quarter of 2016 due to "weakness in [its] Legacy market."⁸²

The record is *especially* compelling with respect to the presence of competitive transport facilities.⁸³ Competitive fiber rings have been built over the course of three decades, with more than twenty non-ILEC providers deploying competitive fiber transport facilities in some areas with BDS demand.⁸⁴ When operating outside their incumbent footprints, ILECs routinely use non-ILEC transport to carry traffic from channel terminations they purchase from another ILEC.⁸⁵ Notably, the portrayal of BDS transport competition in the current record may even be conservative, because the Commission's data collection was focused on channel terminations. Although the agency (through the Wireline Competition Bureau) did ask CLECs to identify an element of a circuit as "channel mileage" or "local transport" (Table II.A.14), CLECs exercised

White Paper, at 5, attached to letter from Glen Woroch, Senior Consultant, Compass Lexecon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 *et al.* (filed June 28, 2016).

⁸⁰ See IRW Second Supp. Decl. at 14-15. Again, this does not include the availability of CLEC services provided over non-fiber facilities.

⁸¹ *Id.* at 34.

⁸² See Sean Buckley, *Frontier's McCarthy: We see 30K on-net business fiber opportunities in our CTF footprint*, FierceTelecom (Mar. 1, 2017), <http://www.fiercetelecom.com/telecom/frontier-s-mccarthy-we-see-30k-net-business-fiber-opportunities-our-ctf-footprint>.

⁸³ See, e.g., Letter from Russell P. Hanser and Brian W. Murray, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.* (filed Nov. 10, 2016); Letter from Mike Saperstein, Vice President, Federal Regulatory Affairs, Frontier Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.*, at 1 (filed Oct. 28, 2016) (noting the "particularly competitive nature of the transport market").

⁸⁴ Letter from James P. Young, Sidley Austin LLP, Counsel to AT&T Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.*, at 4-11 (filed Oct. 25, 2016).

⁸⁵ Even the most enthusiastic proponents of BDS regulation have recognized the folly of arguing that there is a lack of transport competition. See *id.* at 5-7. Instead, they have focused their advocacy on last-mile channel terminations, as evidenced by their advocacy urging the Commission to assess competition on a "building-by-building" or "location-by-location" basis – an approach that necessarily would exclude any "route-by-route" assessment. See Letter from Russell P. Hanser, Wilkinson Barker Knauer LLP, Counsel to CenturyLink, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.*, at 8 (filed Oct. 28, 2016).

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discretion in terms of how to characterize these circuit elements, leading to a variety of responses that may have under-counted the extent of CLEC-deployed transport. Moreover, neither the original NPRM nor the analysis by the Commission’s expert, Dr. Marc Rysman, contains any meaningful discussion of transport – in fact, transport connections were removed entirely from Dr. Rysman’s analysis.⁸⁶

Any doubt about the growth of BDS competition should be extinguished by evidence of rapidly falling prices. Light-touch regulation (such as that resulting from the *Enterprise Broadband Forbearance Orders*) and greater demand for high-bandwidth services has led to consistently declining prices for Ethernet services.⁸⁷ As CenturyLink and Frontier have shown, BDS prices are falling even as ILEC unit costs are rising.⁸⁸ This steady trend of decreasing prices reinforces both the competitive nature of the marketplace and the public policy benefits of deregulating these services.

Of course, even the facts discussed above dramatically understate competition in 2017, because the Commission’s data reflects the state of the market as of 2013. Since that time, ILECs have continued to lose revenues to cable providers and other new entrants, and the market has shifted even more dramatically toward next-generation Ethernet services, a segment in which ILECs have never exercised any form of dominance. Any regime meant to account for the marketplace of the present and the future must reflect the market facts pertinent to that time-frame – meaning, here, that the Commission must consider marketplace developments since 2013.

These facts, and others in the record, necessitate a finding that price-cap ILECs are not dominant in the provision of BDS at any capacity level. Cable providers and others supply or are capable of supplying reasonable substitutes for the services ILECs offer, and they do so in almost every location served by a price-cap ILEC. These providers regularly build out links from existing facilities to serve specific locations when demand arises, even at relatively low capacity levels. These offerings exert competitive force on ILECs’ own BDS products, banishing any “market power” ILECs might once have held and warranting a finding that price-cap ILECs are non-dominant in the provision of BDS.

* * *

⁸⁶ See *id.* at 10; see also Revised Rysman Report at 6 (“My approach of aggregating to the level of the circuit rules out separate analysis of the transport market. In this paper, I focus only on the market for circuits provided to customers (sometimes called the channel termination market), although the transport market may also be interesting to study.”).

⁸⁷ Mid-Size ILEC Reply Comments at 9-13.

⁸⁸ *Id.* at 11.

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In light of the above, the Commission should declare that ILECs are non-dominant in the provision of BDS, recognizing current competitive realities and establishing a level playing field. In particular, it should make clear that the following mandates no longer apply to ILEC-provided BDS offerings at any capacity level (*i.e.*, to any TDM or packet-based ILEC service at or above DS1 capacity):⁸⁹

- Dominant carrier tariff filing and price cap and rate-of-return regulations, including the duty to file cost support;⁹⁰
- Those portions of the discontinuance requirements that apply only to dominant carriers;⁹¹
- Those portions of the domestic transfer of control requirements that apply only to dominant carriers;⁹² and
- Obligations regarding proposed changes in depreciation rates and those portions of the contract filing requirements that apply only to dominant carriers.⁹³

Please contact the undersigned with any questions.

Sincerely,

/s/ Russell P. Hanser

Russell P. Hanser

Brian W. Murray

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⁸⁹ For most price-cap ILECs, packet-based BDS offerings are no longer subject to dominant carrier regulation because of the *Enterprise Broadband Forbearance Orders*. See *BDS FNPRM*, 31 FCC Rcd at 4735-36 ¶ 25.

⁹⁰ See 47 U.S.C. §§ 203, 204(a)(3); 47 C.F.R. §§ 61.31-61.59. See also *US Telecom Non-Dominance Order*, 31 FCC Rcd at 8298-99 ¶¶ 44-46.

⁹¹ See 47 U.S.C. § 214; 47 C.F.R. § 63.71; see also *US Telecom Non-Dominance Order*, 31 FCC Rcd at 8300-01 ¶¶ 50-52.

⁹² See 47 U.S.C. § 214; 47 C.F.R. § 63.03; see also *US Telecom Non-Dominance Order*, 31 FCC Rcd at 8301-02 ¶¶ 53-54.

⁹³ See 47 C.F.R. § 43.43 (proposed changes in depreciation rates); *id.* § 43.51 (contract filing requirements); see also *Section 272 Sunset Order*, 22 FCC Rcd at 16478 ¶ 78.